United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

WILLIAM REID and WILBUR P. REID, Partners doing business under the firm name and style of NATIONAL COLD STORAGE & ICE COMPANY,
Plaintiffs in Error,

v.

H. A. BAKER,
Defendant in Error.

Reply Brief of Plaintiffs in Error

Upon Writ of Error to the United States District Court for the District of Oregon.

J. F. BOOTHE, Esq.,
Attorney for Plaintiffs in Error.

CLARK, MIDDLETON, CLARK & SKULASON,
Of Counsel for Plaintiffs in Error.

CAREY & KERR, and
OMAR C. SPENCER,
Attorneys for Defendant in Error.

F. W. BALTES AND COMPANY, PRINTERS, PORTLAND

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Counsel for defendant in error, in their brief, and again on the oral argument, seem to contend that, admitting the trial Court erred in the admission of evidence the plaintiffs in error later failed to object to the introduction of other evidence of the same general character and thereby waived the errors complained of. The argument of counsel for defendant in error in its various phases as presented in their brief, and stressed upon the oral presentation of this case, are so completely answered in the opinion in the case of *Salt Lake City v. Smith,* 104 Fed. 457, 470, an opinion of the Circuit Court of Appeals of the Eighth Circuit written by Judge Sanborn, that we content ourselves with the following quotation therefrom:

> "Another contention is that counsel for the city waived their objection, because, after it was offered, and after they had taken their exception,

they permitted the testimony of other witnesses to be read without objection, and because in the proof of their defense they availed themselves of the same class of testimony. But the single objection which they made, and the single exception which they took, presented the entire question of the introduction of this hearsay testimony, and elicited a ruling of the court upon it which was conclusive and controlling at that trial of this case. There was no reason or call for further objections to evidence of this character, and their only effect would have been to annoy the court and to delay the trial. When a question has once been fairly presented to the trial court, argued, and decided, and an exception to the ruling has been recorded, it is neither desirable nor seemly for counsel to continually repeat their objections to the same class of testimony, and their exceptions to the same ruling which the court has advisedly made as a guide for the conduct of the trial. Counsel for the city lost nothing by their failure to annoy the court by repeating an objection which it had carefully considered and overruled. Nor did they waive this objection and exception by introducing in defense of the suit evidence of the same character as that to which they had objected, and which they had insisted was incompetent. They had presented their view of this question. They had objected to hearsay testimony, and had excepted to the ruling which admitted it. They had not invited the error of that ruling, but had

protested against it. This was all that they could do. The plaintiffs had induced the court to commit the error, and were thereby prohibited from availing themselves of it in any court of review. Under this error they established their case by hearsay. Were counsel for the city required to refrain from meeting this proof by evidence of like character, under a penalty of a loss of their objection and exception? By no means. They had presented to the court and argued what they deemed to be the law. The court had held that they were mistaken. However firm they were in their conviction of the soundness of their position, the presumption was that they were in error; and it was the part of prudence and their duty to their client and the court to produce all the evidence which they could furnish in support of their demands, under the rule which the court announced, firmly but respectfully preserving their right to reverse the judgment if they failed to win their suit under the erroneous rule which the court had established. If they succeeded and obtained a verdict, the plaintiffs could not complain of the error which they had themselves invited, and the defendant's case would be won. If they failed, they would in this way preserve, as they had a right to do, the right of their client to the trial of its case according to the statute and the established rules of evidence, of which the erroneous ruling had deprived them. One who objects and excepts to an erroneous ruling which

permits his opponent to present improper evidence does not waive or lose his objection or exception, or his right to a new trial on account of it, by his subsequent introduction of the same class of evidence in support of his case. *Russ v. Railway Co.,* 112 Mo. 45, 50, 20 S. W. 472, 18 L. R. A. 823; *Gardner v. Railway Co.,* 135 Mo. 90, 98, 36 S. W. 214."

J. F. Boothe, Esq.,
Attorney for Plaintiffs in Error.

Clark, Middleton, Clark & Skulason,
Of Counsel.